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Introduction

Infertility is a life-altering diagnosis. With few exceptions, it is not a diagnosis that surprises an individual at a yearly physical exam; rather, it comes after months of failed attempts to conceive a child. The medical community defines infertility as the inability of a woman to conceive after "one year [or more] of unprotected, well-timed [sexual] intercourse."[1] Inherent in the medical definition are months of loss, dashed expectations, and the emotional turmoil that results from attempting to have a child and failing.

Faced with the high costs of medical care and the possibility of not having children, women and couples have turned to insurance as a means to pay for increasingly expensive assisted reproductive technology (ART).[2] These treatments have relatively low success rates, meaning that women often maximize the use of their health insurance to pay for repeated and unsuccessful attempts at achieving pregnancy.[3] Many employers, attempting to cut costs, have excluded infertility treatments from their insurance plans and have placed limits on the amount of leave employees can use to receive treatments.[4] Women have challenged these exclusions as a form of employer sex discrimination under the Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII of the Civil Rights Act of 1964

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1. RESOLVE, *What Is Infertility?*, http://www.resolve.org/site/PageServer?pagename=lrn_wii_home (last visited Nov. 4, 2009).

2. KAREY HARWOOD, THE INFERTILITY TREADMILL: FEMINIST ETHICS, PERSONAL CHOICE, AND THE USE OF REPRODUCTIVE TECHNOLOGIES 42 (2007).

3. *Id.*

4. *Id.* at 20.

(Title VII).[5]

While holding that such exclusions are impermissible offers some measure of relief for individual women, it also has the impact of increasing employers' costs for hiring women as a group. This dichotomy presents the question of whether individual gains are worth the price incurred by all women. The alignment of infertility exclusions with pregnancy discrimination harms feminist goals of improving women's roles, participation, and status in the workforce. Additionally, neither the legislative intent in passing the PDA nor Supreme Court jurisprudence offer significant support for the argument that infertility exclusions are analogous to pregnancy discrimination.

This Article argues that such infertility exclusions do not constitute sex discrimination. Requiring employers to pay for highly unsuccessful and expensive infertility treatments will lead to negative, albeit illegal, responses to the hiring of women, thereby diminishing the footholds that women have gained in the labor force. Further, requiring employers pay for ART will perpetuate the assumption by women that they can delay childbearing almost indefinitely to focus on their careers. These incorrect assumptions will weaken the demand for workplace policies that truly allow women to sustain both family and career goals. Finally, the alignment of infertility exclusions with pregnancy discrimination reinvigorates societal perceptions of a woman's childbearing capacity as the measure of her worth, as if to deny her every infinitesimal opportunity to bear children is robbing her of her very essence. As a result, while individual women may gain from the alignment of infertility exclusions with sex discrimination, women as a group are harmed by such characterizations.

Part I of this Article explains the nature of infertility and the range of current medical treatments available. In particular, this Part details how costly and relatively ineffective ART is in resolving infertility since the leading factor in infertility is the advanced age of women. Part II details feminist legal theories, illustrating how the prevailing legal approach to sex discrimination during the 1970s—the equality model—resulted in specific legislation to address pregnancy. This Part discusses the primary motivation for passing the PDA, which was not to elevate pregnancy to its own level of legal protection, but to protect women from adverse job actions based on pregnancy—a primary cause of

5. 42 U.S.C. § 2000e-2 (2006). For the full text of the Act, see *infra* note 59.

women's departure from the workforce. Part III details the history of sex discrimination jurisprudence prior to the PDA and highlights the doctrinal gap that operated to the disadvantage of women on the issue of pregnancy. Part IV explains the PDA and how Congress acted to cure that doctrinal gap. Part V delineates the Supreme Court's interpretations of the PDA and demonstrates how the Court has adopted a "dominance" approach to interpreting sex discrimination. This approach evaluates how a policy impacts women in the labor market to determine if the policy is permissible. Finally, Part VI of this Article discusses the applicability of the PDA to infertility exclusions under the dominance approach. This Part explains how determining that infertility exclusions constitute sex discrimination does not improve equality for women workers.

I. Infertility and Insurance Coverage

The medical community has worked steadily on treatment for infertility since the first report of in vitro fertilization of a human egg in 1944.[6] In the United States after World War II, individuals regarded science as preeminent, and once the federal government began funding research and development, advances in infertility treatment saw exponential growth.[7] The pronatalist sentiment of the post-war era created the complementary demand for infertility treatments as well.[8] Primary motivators of the era's pronatalism were a societal desire to push women back to the domestic sphere—thereby vacating jobs for returning male soldiers to fill—and a desire to reassure "issues of male identity and cultural anxieties."[9]

Today, infertility affects one in seven U.S. adults.[10] While there are many causes of infertility, "the single most important determinant of a couple's fertility is the age of the female partner."[11] A woman's fertility peaks around age twenty-seven and sharply declines after age thirty-five.[12] There is an

6. MARGARET MARSH & WANDA RONNER, THE EMPTY CRADLE: INFERTILITY IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 171 (1996).

7. *Id.* at 181–82.

8. *Id.* at 183–85.

9. *Id.* at 185.

10. LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 10 (2007).

11. ADAM H. BALEN & HOWARD S. JACOBS, INFERTILITY IN PRACTICE 3 (2d ed. 2003).

12. DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 15 (2006).

"inescapable correlation between fertility and youth."[13]

Other leading causes of female infertility are endometriosis, fibroids, tubal scarring, and ovulation problems most often caused by advanced age.[14] Endometriosis, while also causing pelvic pain,[15] primarily causes infertility due to pelvic deformity.[16] Pelvic deformity occurs when "bits of the uterine lining . . . slough off and block the fallopian tubes."[17] Fibroids prevent implantation of an embryo due to the distortions they can cause in the uterus.[18] Tubal scarring is the result of pelvic infection, often from sexually transmitted diseases or childbirth.[19] While some ovulation problems—such as a woman born without ovaries or with hormone imbalances—are tied to physiology, increasingly, "ovulatory disorders are linked directly to age."[20] Medical interventions for female infertility range from minor—including hormone medication to improve ovulation[21] and surgery to remove fibroids[22] and treat endometriosis[23]—to the most advanced and expensive treatment of in vitro fertilization, for which doctors create embryos in a lab and implant them in a woman's womb.[24]

Male infertility is due to problems with sperm, either defective sperm from infection or genetics,[25] or mechanical difficulties in ejaculating sperm.[26] Aside from replacing sperm through the use of donor sperm,[27] treatments have centered on "enhancing sperm quality in vitro rather than treating the underlying dysfunction."[28] Methods of gathering viable sperm include working with a sample of ejaculate or, in the case of men who are unable to ejaculate, through methods such as electroejaculation[29] or sperm aspiration.[30]

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13. *Id.*
14. *Id.* at 14–15.
15. BALEN & JACOBS, *supra* note 11, at 237.
16. *Id.* at 239.
17. SPAR, *supra* note 12, at 14.
18. BALEN & JACOBS, *supra* note 11, at 266.
19. MUNDY, *supra* note 10, at 27.
20. SPAR, *supra* note 12, at 15.
21. MUNDY, *supra* note 10, at 25.
22. BALEN & JACOBS, *supra* note 11, at 266–67.
23. *Id.* at 237.
24. *Id.* at 317–32.
25. The nature of sperm defects can range from low motility, a condition where they lack the ability to penetrate an egg, to misshapenness. MUNDY, *supra* note 10, at 68.
26. *See* BALEN & JACOBS, *supra* note 11, at 273–95.
27. *Id.* at 291–95.
28. *Id.* at 273.
29. *Id.* at 289.

Several medical interventions can treat infertility without removing the underlying cause, and doctors generally use these interventions in cases of unexplained infertility.[31] These procedures, called ART, are "all treatments or procedures that involve surgically removing eggs from a woman's ovaries and combining the eggs with sperm to help a woman become pregnant."[32] These include gamete intrafallopian transfer (GIFT), in vitro fertilization (IVF), and zygote intrafallopian transfer (ZIFT).[33] The most advanced and expensive form of infertility treatment is IVF.[34] The average cost of one cycle of IVF ranges from $10,000 to $15,000.[35]

Only eleven states mandate some form of insurance coverage for infertility: Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Jersey, New York, Rhode Island, and West Virginia.[36] Insurance coverage for infertility is voluntary in all other states. However, even in the states where coverage is mandatory, many couples—such as those who are not married,[37] couples who have not been infertile for the requisite period of time,[38] gay and lesbian couples,[39] couples not covered by

30. MUNDY, *supra* note 10, at 73–74.

31. BALEN & JACOBS, *supra* note 11, at 302.

32. CENTERS FOR DISEASE CONTROL AND PREVENTION ET AL., 1997 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 383 (1999), *available at* http://www.cdc.gov/art/ArchivedARTPDFs/97art.pdf.

33. *Id.* at 10–11. GIFT is a process whereby the ova and sperm are mixed in a petri dish and then placed in the fallopian tubes so that fertilization and implantation can occur. *Id.* IVF is the process whereby fertilization happens in a lab and the resulting embryos are placed in a woman for implantation. *Id.* ZIFT is a process whereby doctors place an egg, fertilized outside the body, into a woman's fallopian tubes. *Id.*

34. Barbara Collura, *The Costs of Infertility Treatment*, RESOLVE, http://www.resolve.org/site/PageServer?pagename=lrn_mta_cost (last visited Nov. 4, 2009). IVF is the most common form of ART. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 32, at 10.

35. Amy B. Monahan, *Value-Based Mandated Health Benefits*, 80 U. COLO. L. REV. 127, 160 (2009).

36. *Id.* at 183–84 & n.221.

37. HAW. REV. STAT. § 431:10A-116.5 (2008); MD. CODE ANN., INS. § 15-810 (LexisNexis 2008).

38. *See* CONN. GEN. STAT. ANN. § 38a-536 (West 2007) (requiring that couples have been unable to conceive or sustain a pregnancy during a one-year period); HAW. REV. STAT. § 431:10A-116.5 (requiring a "history of infertility of at least five years' duration"); 215 ILL. COMP. STAT. ANN. 5/356m (West 2007) (requiring that couples have been unable to conceive after one year); MD. CODE ANN., INS. § 15-810 (requiring infertility of at least two years' duration); MASS. ANN. LAWS ch. 175, § 47H and ch. 176B, § 4J (LexisNexis 2008) (requiring that couples have been unable to conceive during a period of one year); N.J. STAT. ANN. § 17:48A-7w (West 2008) (requiring that couples have been unable to conceive after two years if the female partner is under thirty-five; after one year if the female partner is thirty-five or

HMOs,[40] women over or under a certain age cap,[41] or women who have surpassed the allotted number of IVF attempts[42]—do not meet the guidelines for mandatory coverage.

These limits on coverage imply more than just social policy norms about who should become parents. The reality of the current healthcare market, absent government subsidization, is that "in an era of managed care, infertility treatments are subjected to cost-benefit analysis and the scrutiny that comes with trying to determine the legitimacy and priority of a given treatment when not all treatments can be covered."[43] Limitations based on age, number of attempts, and demonstration of infertility for a requisite amount of time surely reflect a concern of diminishing returns, particularly because a woman's conception rates decrease as she ages during the course of treatment.[44] Additionally, the moral hazard of women and couples continuing to choose IVF, despite the indication that it will not be successful, leads to an actuarial decision on the part of states not to force employers to pay for endless and unsuccessful treatments.[45] Research has shown that women facing infertility will utilize ART as long as they can financially afford to do so,[46] proving that insurance coverage distorts the market for such services.[47]

II. Feminist Legal Theory

Most scholars regard the field of feminist legal theory to have begun in the 1970s.[48] For decades prior, "separate spheres"

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older); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-41-33 (2008) (requiring that couples have been unable to conceive during a period of one year).

39. *See id.* Laws requiring demonstrated infertility of a certain period exclude gay and lesbian couples. In addition, several states require all IVF to be performed with a spouse's sperm, thereby excluding gay and lesbian couples. HAW. REV. STAT. § 431:10A-116.5; MD. CODE ANN., INS. § 15-810.

40. W. VA. CODE ANN. § 33-25A-2 (LexisNexis 2007).

41. CONN. GEN. STAT. ANN. § 38a-536 (must be younger than forty years old); N.J. STAT. ANN. § 17:48A-7w (must be forty-five years old or younger); N.Y. INS. LAW § 3221 (McKinney 2007) (must be between twenty-one and forty-four years old); R.I. GEN. LAWS §§ 27-18-30, 27-41-33, 27-19-23 (2007) (must be between twenty-five and forty-two years old).

42. CONN. GEN. STAT. ANN. § 38a-536; 215 ILL. COMP. STAT. ANN. 5/356m (West 2007); MD. CODE ANN., INS. § 15-810; N.J. STAT. ANN. § 17:48A-7w.

43. HARWOOD, *supra* note 2, at 42.

44. BALEN & JACOBS, *supra* note 11, at 3.

45. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 335 (1992) (discussing the moral hazard of insurance related to pregnancy).

46. HARWOOD, *supra* note 2, at 76–77.

47. *See* EPSTEIN, *supra* note 45.

48. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 23 (2d ed.

ideology characterized the legal analysis of women and held, as a matter of law, that as men and women were different, the law could treat them differently.[49] The most well-known articulation of this ideology is that of Justice Bradley in his 1873 concurrence in *Bradwell v. Illinois*,[50] stating that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[51] Separate spheres ideology was the basis for upholding a range of so-called protective legislation, such as barring women from the legal profession,[52] limiting the number of hours women could work,[53] and, even as late as the 1960s, exempting women from jury duty.[54] Judges and lawmakers accepted these pronatalist policies—policies that funneled women out of the labor market and into domestic life—since the dominant ideology explained women's roles as a result of biological differences between the sexes and not of sexist thinking.[55]

Feminists, in addressing the subjugation of women in society, sought a means to challenge workplace discrimination and were successful in promoting equality-based legal theories and legislation.[56] Feminists lobbied Congress to pass specific bills designed to remedy discrimination based on sex[57]—such as the Equal Pay Act of 1963[58]—and to add sex to other civil rights legislation aimed at remedying race discrimination—such as the Civil Rights Act of 1964.[59] By linking the struggle for sex equality

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2003).

49. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 15–16 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

50. 83 U.S. 130 (1873) (Bradley, J. concurring).

51. *Id.* at 141.

52. *Id.*

53. Muller v. Oregon, 208 U.S. 412 (1908).

54. Hoyt v. Florida, 368 U.S. 57 (1961), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975). The Court stated that "woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State . . . to conclude that a woman should be relieved from the civil duty of jury service . . . ." *Id.* at 62.

55. CHAMALLAS, *supra* note 48, at 25.

56. *Id.* at 26–27.

57. *Id.* at 24.

58. 29 U.S.C. § 206(d) (2006).

59. *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 164–65 (1991); *see also* 42 U.S.C. § 2000e-2(a) (2006). The Civil Rights Act of 1964 made it

> an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees

to that of racial equality, feminists sought to improve the legal status of women.[60]

Feminists argued that "[d]ifferences among men and differences among women were as significant as the differences between men and women."[61] The overall goal of the feminist movement, however, was not simply to have men and women treated exactly the same. Rather, the goal was to give women what men had—"a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity."[62]

This equality-based approach, however, failed when applied to pregnancy because the fact that women could carry children and men could not was the "centerpiece, the linchpin, the essential feature of women's separate sphere."[63] As a result of this biological difference, the Supreme Court held that pregnancy classifications did not violate constitutional equal protection principles or Title VII.[64] Given the severe consequences of pregnancy for working women, feminists lobbied Congress to amend the Civil Rights Act through the PDA[65] so as to statutorily define pregnancy discrimination as sex discrimination.[66]

> or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. In cases applying the Act to employer decisions based on pregnancy prior to the amendment of the PDA, the Supreme Court found such practices did not constitute sex discrimination. *See infra* notes 80–104 and accompanying text.

60. CHAMALLAS, *supra* note 48, at 23 (noting that the "basic strategy was to analogize unequal or discriminatory treatment of women to racial discrimination.").

61. *Id.* at 30.

62. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER, *supra* note 49, at 81.

63. Williams, *supra* note 49, at 22. Williams further comments that "[t]he stereotypes, the generalizations, the role expectations were at their zenith when a woman became pregnant." *Id.*

64. *See infra* notes 74–78 and accompanying text.

65. 42 U.S.C. § 2000e(k) (2006). The PDA inserted section k into the existing Civil Rights Act. Section k provides:

> [T]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

Id.

66. Williams, *supra* note 49, at 25. Some feminists have referred to the PDA as a "doctrinal embarrassment" since it highlights the failure of the equality approach

Therefore, the primary goal in the promotion and passage of the PDA was to fill a gap created by equality-based legislation that left women vulnerable to subjugation in the labor market.

As Parts III, IV, and V will demonstrate, the passage of the PDA represents an evolution from an approach to women's rights based on pure equality to one based on the dominance approach.[67] This approach asks what women need to make them equal competitors to men in the labor market and allows for some special treatment, if such treatment "would help to lessen women's oppression."[68] The Supreme Court has embraced this approach to interpreting the PDA, allowing states to offer pregnant women greater benefits than similarly situated men.[69]

The dominance approach is the correct way to interpret the PDA since the ultimate goal of the legislation was to alleviate the subjugation of women in the labor market. Thus, mandating employer-subsidized infertility coverage is a reversion to the pronatalist sentiment of the post-war era[70] and will result in the increased subordination of women in the labor force.

III. Sex Discrimination Prior to the PDA

Two significant Supreme Court cases exemplify the judicial treatment of pregnancy under the equality model of sex discrimination prior to the PDA. Each of these cases evaluated whether pregnancy exclusions in insurance plans were permissible. Both times, the Supreme Court found these plans permissible, despite clear and obvious disadvantages to women in the labor force.

A. Geduldig v. Aiello[71]

The first significant case examining pregnancy exclusions was a 1974 constitutional challenge to a California disability program that excluded pregnancy as a covered event.[72] The

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to capture the full nature of women's subordination. *See* MacKinnon, *supra* note 62, at 86.

67. *See* SALLY KENNEY, FOR WHOSE PROTECTION?: REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN 155 (1992); MacKinnon, *supra* note 62, at 89.

68. KENNEY, *supra* note 67, at 155.

69. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

70. *See supra* notes 6–9 and accompanying text.

71. 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, *as recognized in* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985).

72. *Id.* at 486.

plaintiffs argued that the exclusion of coverage for pregnancy was sex discrimination in violation of the Fourteenth Amendment's Equal Protection clause.[73] Even though the Supreme Court had begun to apply heightened scrutiny to distinctions involving sex,[74] the Court had previously held that more rigorous scrutiny was not called for when the policies turned on actual differences between men and women.[75]

In its application of heightened scrutiny, the Court "drew the line at pregnancy."[76] The Court summed up its logic in a footnote: "The program divides potential recipients into two groups—pregnant women and nonpregnant persons."[77] Since both groups contain women, the Court determined that such a classification could not be sex-based.[78]

B. General Electric Co. v. Gilbert[79]

The next case considering pregnancy classifications addressed statutory definitions of sex discrimination.[80] Title VII created a cause of action for sex discrimination that applied to state, federal, and private employers.[81] Supreme Court interpretation of the legislation, now codified in the law, has evinced two separate ways for plaintiffs to challenge the actions of an employer related to sex. The first is a disparate treatment analysis where an employer who creates policies that expressly distinguish between men and women faces liability unless the categorization is a bona fide occupational qualification (BFOQ).[82] The BFOQ defense is an "extremely narrow exception to the general prohibition of discrimination on the basis of sex,"[83]

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73. *Id.* at 486–87.

74. *See* Reed v. Reed, 404 U.S. 71, 76–77 (1971) (noting that a mandatory preference for men over women as the administrators of estates under state law was arbitrary and not justified); *see also* KENNEY, *supra* note 67, at 164–69 (discussing the level of scrutiny applied to sex discrimination in Equal Protection cases).

75. *See supra* notes 60–64 and accompanying text.

76. Williams, *supra* note 49, at 22.

77. *Geduldig*, 417 U.S. at 497 n.20.

78. *Id.*

79. 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, *as recognized in* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

80. *Id.* at 133.

81. 42 U.S.C. § 2000e (2006).

82. 42 U.S.C. § 2000e-2(e) ("[A] bona fide occupational qualification [is one] reasonably necessary to the normal operation of that particular business or enterprise . . . .").

83. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

whereby the classification is "reasonably necessary to the normal operation of that particular business or enterprise."[84] It is difficult for an employer to prevail on these grounds.

The Supreme Court, however, also broadened the scope of impermissible conduct under Title VII to include those facially neutral practices that had a discriminatory impact on a protected group.[85] An employer must demonstrate a business necessity for these practices in order to avoid liability for a disparate impact.[86] The business necessity defense is a broader exception than that of a BFOQ, making it easier for an employer to avoid liability.[87] However, a plaintiff need not show that the employer acted with discriminatory intent to prevail on a discrimination claim under the disparate impact theory.[88]

In *Gilbert*, the Court considered a disability program that excluded pregnancy as a covered condition to evaluate whether such a classification constituted sex discrimination.[89] The Court imputed the *Geduldig* logic of pregnant and non-pregnant persons.[90] Based on the lack of legislative history related to sex discrimination, the Court ruled that Congress, in passing Title VII, had not intended to overrule its reasoning in *Geduldig*.[91] The Court noted that "[t]he legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity."[92] The Court capitalized on the prevailing view that Congress included sex as a prohibited category of the Civil Rights Act in an attempt to defeat the bill.[93]

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84. 42 U.S.C. § 2000e-2(e).

85. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

86. *Id.*

87. Robinson v. Lorillard Corp., 444 F.2d 791, 797 (4th Cir. 1971).

88. KENNEY, *supra* note 67, at 149–50.

89. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, *as recognized in* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

90. *Id.* at 136 ("*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.").

91. *Id.*

92. *Id.* at 143.

93. Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880–83 (1966) (discussing the intention of the amendment's author to kill the bill by adding sex); *see also* Gene Ann Roelofs, *Sex Discrimination and Insurance Planning: The Rights of Pregnant Men and Women Under* General Electric Co. v. Gilbert, 22 ST. LOUIS U. L.J. 101, 106 n.38 (1978) (noting the "levity" with which the amendment to add sex to Title VII was brought). *But see* Freeman, *supra* note 59, at 164–65 (discussing the active work of feminists to add sex to the list of prohibited categories). Freeman notes that on the day sex was added to the bill, nineteen other amendments were voted on, and the

Justice Brennan dissented and challenged the majority's assertion that classifications based on pregnancy are, in fact, sex-neutral.[94] Since a plaintiff in a Title VII case could prevail if a practice had a disparate impact,[95] he argued that the analysis must be more rigorous and should look at the effects of the categorization, not just the intent.[96] To Justice Brennan, the notable distinction was that the plan had "an adverse impact on women . . . [since it] insure[d] all risks except a commonplace one that is applicable to women but not men."[97] He believed the issue revolved around comprehensive coverage because the plan offered such coverage to men and not women, thereby demonstrating disparate impact.[98] Therefore, even if the plan was categorically sex-neutral, the plaintiffs, in demonstrating a prima facie violation of Title VII based on the *effects* of the plan, were entitled to a more rigorous analysis to determine if the policy "was actually the product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women's role in the labor force."[99]

In essence, Justice Brennan acknowledged the doctrinal shortfall of the equality-based focus on sex discrimination legislation.[100] To Justice Brennan, since the goal of the Title VII was to promote the equality of women, the relevant inquiry was whether the classification negatively impacted women.[101]

Justice Stevens also dissented, noting that there was no need to undergo disparate impact analysis since the statutory language clearly required a finding of disparate treatment.[102] Justice Stevens rejected the notion that a pregnancy classification was neutral since "it is the capacity to become pregnant which primarily differentiates the female from the male."[103] Since the

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largest vote tally was for the sex amendment, indicating that several dozen Representatives were available to support the amendment who were not present to vote on others. *Id.* This betrays the general logic that Congress added sex to the legislation as an afterthought. *Id.*

94. *Gilbert*, 429 U.S. at 152 (Brennan, J., dissenting).

95. *See supra* notes 85–88 and accompanying text.

96. *Gilbert*, 429 U.S. at 148 (Brennan, J., dissenting); *see also supra* notes 81–88 and accompanying text.

97. *Id.* at 155.

98. *Id.*

99. *Id.* at 149.

100. *See supra* notes 63–66 and accompanying text.

101. *Gilbert*, 429 U.S. at 148 (Brennan, J., dissenting) ("[T]he resulting pattern of risks insured by General Electric can then be evaluated in terms of the broad social objectives promoted by Title VII.").

102. *Id.* at 162 (Stevens, J., dissenting).

103. *Id.* (Stevens, J., dissenting).

plan separated women from men in this way, there was discrimination on the basis of sex "by definition."[104]

IV. The Pregnancy Discrimination Act of 1978

The congressional response to the *Gilbert* decision was a clear repudiation of the logic that pregnancy classifications were sex-neutral. The opening remarks for the introduction of the bill in both houses of Congress, as well as both the Senate and House conference reports, all mention the *Gilbert* decision.[105] Congress passed the PDA to correct the "serious setback to women's rights and to the development of antidiscrimination law under title VII of the Civil Rights Act of 1964."[106]

Congress specifically endorsed the dissenting opinions of Justices Brennan and Stevens.[107] In particular, Congress noted that the real intent of the Civil Rights Act was to make workplace policies that disadvantaged women impermissible.[108] As a result, Congress amended Title VII to include subsection k, which defines the phrases "on the basis of sex" and "because of sex" in the original language of Title VII to include employment decisions made on the basis of "pregnancy, childbirth, or related medical conditions . . . ."[109] To deal with the "doctrinal embarrassment"[110] posed by equality-based sex discrimination logic around pregnancy, Congress mandated that pregnancy classifications were sex discrimination, and therefore courts must evaluate them under disparate treatment jurisprudence and not disparate impact.[111] As a result, pregnancy distinctions can only survive if they are a BFOQ.[112]

Congress adopted a disability model for analyzing pregnancy as a form of illness that impacted a woman's ability or inability to

104. *Id.* at 161 (Stevens, J., dissenting).

105. 123 CONG. REC. 4137–45 (1977) (introductory remarks of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 1 (1980) [hereinafter PDA LEG. HISTORY]; 123 CONG. REC. 2120–21 (1977) (introductory remarks of Rep. Hawkins), *reprinted in* PDA LEG. HIST. at 11; S. REP. NO. 95-331, at 2 (1977); H.R. REP. NO. 95-948, at 2 (1978).

106. 123 CONG. REC. 4137–45 (introductory remarks of Sen. Williams), *reprinted in* PDA LEG. HISTORY, *supra* note 105, at 1.

107. S. REP. NO. 95-331, at 2; H.R. Rep. No. 95-948, at 2.

108. 123 CONG. REC. 4137–45 (introductory remarks of Sen. Williams), *reprinted in* PDA LEG. HISTORY, *supra* note 105, at 3.

109. 42 U.S.C. § 2000e(k) (2006).

110. MacKinnon, *supra* note 62, at 82.

111. *See supra* notes 65, 85–88 and accompanying text.

112. *See supra* note 82.

work.[113] In searching for a comparison, then, courts should compare pregnant women with men who have a short-term disability. While this framework easily fit for pregnancy-related disabilities such as gestational diabetes, feminists at the time were divided on whether a disability model was an appropriate framework in which to consider pregnancy.[114] The fact that pregnancy is not a disability, but rather a condition unique to women, led feminists to argue that framing pregnancy as a disability was adopting men as the norm to which women must conform in seeking legal protections.[115]

Regardless of these shortfalls, the PDA represented Congressional acceptance of Justice Brennan's articulation that pregnancy discrimination caused much of the subordination of women in the labor force. "[P]regnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force."[116] The primary focus of the legislation was to move away from pronatalism and towards the dominance approach that more and more feminists advocated.[117] However, feminists were concerned that extending more benefits to pregnant women would create disincentives to hire women which, though illegal, would be difficult to police and therefore create greater disadvantages for women workers.[118]

V. Sex Discrimination After the PDA

While the PDA did not displace the *constitutional* treatment of pregnancy as a categorization not requiring heightened scrutiny, it dramatically changed the examination of pregnancy exclusions challenged at the *statutory* level. After Congress enacted the PDA, the Supreme Court acknowledged pregnancy exclusions as outright discrimination and began approaching

113. *Id.*

114. SUSAN GLUCK MEZEY, IN PURSUIT OF EQUALITY: WOMEN, PUBLIC POLICY, AND THE FEDERAL COURTS 122 (1992) ("While the subject of dispute in the early cases had been over whether pregnant women at work should be treated differently—and worse—than men at work, the question now was whether pregnant women could (and should) be treated differently—and better—than men.").

115. CHAMALLAS, *supra* note 48, at 44–45.

116. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 158 (1976) (Brennan, J., dissenting), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, *as recognized in* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

117. *See supra* notes 67–70 and accompanying text.

118. KENNEY, *supra* note 67, at 155.

women's subordination from the dominance approach advocated by feminists.[119]

A. Newport News Shipbuilding & Dry Dock Co. v. EEOC[120]

In one of its first opportunities to interpret the new legislation, the Supreme Court addressed whether employers could exclude pregnancy coverage from employee health plans for the wives of their male employees.[121] The Court held that "Congress, by enacting the Pregnancy Discrimination Act . . . rejected the test of discrimination employed by the Court in [*Gilbert*]."[122] The Court expressly adopted the dissenting opinions in *Gilbert*, that the appropriate classification to examine was not "pregnant women and non-pregnant persons,"[123] but rather "persons who face a risk of pregnancy and those who do not."[124] The Court determined that Congress had made it clear that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[125] Therefore, a plan that offered less comprehensive protection to one sex than the other was unlawful.[126]

B. UAW v. Johnson Controls, Inc.[127]

The Supreme Court then addressed so-called "fetal-protection policies" at a battery factory that excluded women from jobs handling lead,[128] holding that such a policy was "not neutral because it [did] not apply to the reproductive capacity of the company's male employees in the same way as it applie[d] to that of the females."[129] The Court also clarified that a policy based on pregnancy would have to pass muster under the BFOQ exception of disparate treatment, and not the business necessity defense of disparate impact jurisprudence.[130] The Court's opinion was a clear acknowledgement that the discrimination analysis of pregnancy

119. *See supra* notes 63–69 and accompanying text.

120. 462 U.S. 669 (1983).

121. *Id.* at 671.

122. *Id.* at 676.

123. *Id.* at 678 (citing Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 161–62 (1976) (Stevens, J., dissenting)).

124. *Id.* (quoting *Gilbert*, 429 U.S. at 161–62 (Stevens, J., dissenting)).

125. *Id.* at 684.

126. *Id.* at 676.

127. 499 U.S. 187 (1991).

128. *Id.* at 197.

129. *Id.* at 199.

130. *Id.* at 199–200; *see also supra* notes 82–88 and accompanying text.

must go beyond the equality approach, which allows different treatment based on biological differences, to a dominance approach, which looks critically at policies that undermine the role of women in the workforce.[131]

C. California Federal Savings & Loan Ass'n v. Guerra[132]

In its next pregnancy case, the Supreme Court firmly validated that the dominance approach to women's role in the work force was the appropriate way to evaluate pregnancy distinctions.[133] The Court evaluated a California law that gave pregnant women more rights when returning to work from pregnancy than men returning from disability leave.[134] The Court determined that the PDA created a floor below which pregnancy benefits could not fall, but it did not prevent states from passing legislation offering pregnant women greater benefits.[135] The Court recognized that Congress "saw pregnancy as an integral moment in women's working lives, and was committed to eliminating employment practices that cast them in conflict."[136] In so ruling, the Court again indicated that the dominance approach to sex discrimination—where the relevant question is how a practice impacts the ability of women to participate in the labor force—is the appropriate way to interpret the legislation.

VI. Infertility and the PDA

Congress did not articulate a standard for evaluating infertility in its discussion of the PDA. In part, this omission is likely due to timing. The first IVF child was born in 1981,[137] three years after Congress passed the PDA. Given the contemporaneous debates surrounding a woman's right to abortion and the feminist movement, it is also hardly surprising that the focus of Congress was on mitigating the negative effects of pregnancy—wanted or

131. KENNEY, *supra* note 67, at 155.

132. 479 U.S. 272.

133. *Id.* at 286–89; *see also supra* notes 67–68 and accompanying text (describing the dominance approach).

134. *Guerra*, 479 U.S. at 275–76.

135. *Id.* at 285.

136. Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 939 (1985). The Court specifically noted that the PDA was enacted to "'guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life.'" *Guerra*, 479 U.S. at 289 (quoting 123 CONG. REC. 29,658 (1977)).

137. MUNDY, *supra* note 10, at 29.

unwanted—for working women, and not on issues of infertility. Additionally, the influx of women into the professional workforce[138] may have contributed to the rising demand for fertility treatments[139] due to the impact of advanced age on fertility.[140] This demand would not have been evident at the time Congress passed the PDA.

In determining whether the PDA forbids infertility exclusions, courts should follow the approach intended by Congress and enforced by the Supreme Court. This dominance approach calls upon the judiciary to examine whether "a policy [related to pregnancy] . . . purposefully downgrade[s] women's role in the labor force."[141]

Courts are not always adept at this analysis. For example, the Eighth Circuit held that denial of coverage for contraception in an employer's health plan does not implicate the PDA since "contraception is a treatment that is only indicated prior to pregnancy."[142] For the Eighth Circuit, the fact that "contraception may certainly affect the causal chain that leads to pregnancy" was not sufficient to bring it within the purview of the PDA.[143] A Washington district court previously held the opposite, finding that the lack of coverage for contraceptives left women exposed to a risk to which men were not exposed,[144] thereby violating the comprehensive coverage standard articulated in *Newport News*.[145] The Eighth Circuit's focus on the temporal link of contraception to pregnancy falls short of the congressional mandate to determine if the practice undermines women's role in the labor force.[146] Unplanned and unwanted pregnancy caused by a lack of contraception certainly has this effect, since it forces women out of

138. George Gilder, *Women in the Work Force*, ATLANTIC, Sept. 1986, at 20 ("From 1890 to 1985 the participation in the work force of women between the ages of twenty-five and forty-four soared from 15 to 71 percent, with the pace of change tripling after 1950.").

139. MUNDY, *supra* note 10, at 12.

140. BALEN & JACOBS, *supra* note 11, at 3.

141. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 149 (1976) (Brennan, J., dissenting) *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, *as recognized in* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

142. *In re* Union Pac. R.R. Employment Practices Litig., 479 F.3d 936, 942 (8th Cir. 2007).

143. *Id.* at 941.

144. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1270–72 (W.D. Wash. 2001).

145. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983) (noting that, to be sufficient under the PDA, the insurance coverage of men and women must be equally comprehensive).

146. *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting).

the labor market, thereby disrupting their careers.

Until the recent decision in *Hall v. Nalco Co.*,[147] courts were unanimous in finding that infertility was not a protected condition under the PDA.[148] In *Krauel v. Iowa Methodist Medical Center*,[149] the Eighth Circuit upheld the lower court's grant of summary judgment to an employer who denied health insurance coverage for ART to an otherwise covered employee.[150] The court relied on a rule of statutory construction to hold that since the general phrase "related medical conditions" in the PDA followed the specific terms of "pregnancy" and "childbirth," the PDA should not be read to include conditions outside of the context of those terms.[151] Since infertility prevents conception and therefore pregnancy, the statute did not protect it.[152] The court also found that the lack of mention of infertility in the legislative history was persuasive.[153] The court additionally held that, since the lack of coverage applied to both male and female infertility, the policy was gender neutral.[154]

In *Saks v. Franklin Covey Co.*,[155] the Second Circuit upheld a district court's grant of summary judgment to an employer whose health insurance coverage did not include ART.[156] To the Second Circuit, the test of sex discrimination under the PDA was "whether sex-specific conditions exist, and if so, whether exclusion of benefits for those conditions results in a plan that provides inferior coverage to one sex."[157] While noting that the "related medical conditions" language of the PDA clearly embraced more than just pregnancy,[158] the Second Circuit held that a "condition must be unique to women" to fall under the protection of the

147. 534 F.3d 644 (7th Cir. 2008).

148. *See, e.g.*, Saks v. Franklin Covey Co., 316 F.3d 337, 343 (2nd Cir. 2003); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679–80 (8th Cir. 1996).

149. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996).

150. *Id.* at 676. The employee in *Krauel* was diagnosed with endometriosis which was treated by her doctor and covered under her employee health insurance. *Id.* at 675–76. After continued infertility, Krauel received GIFT. *Id.* at 676. After three cycles of GIFT, Krauel became pregnant and delivered a baby girl. *Id.* Her health insurance covered the pregnancy and delivery expenses but not those for the GIFT. *Id.* See *supra* note 33 for a description of GIFT.

151. *Id.* at 679.

152. *Id.* at 679–80.

153. *Id.* at 679.

154. *Id.* at 680.

155. Saks v. Franklin Covey Co., 316 F.3d 337 (2nd Cir. 2003).

156. *Id.* at 343. For a description of IVF procedures, see *supra* note 33.

157. *Id.* at 344.

158. *Id.* at 345.

PDA.[159] Since infertility affects both men and women with equal frequency, "inferior coverage for infertility . . . [does] not violate the PDA."[160] The court, however, reserved the question of whether a woman who received adverse employment action for taking sick days to undergo surgical implantation procedures would be able to state a claim.[161]

While the courts in *Krauel* and *Saks* reached the right conclusions regarding infertility exclusions, their reasoning incorrectly focused on whether men and women occupy different categories with regard to infertility, such that infertility exclusions operate in the same manner as pregnancy exclusions.[162] These courts correctly evaluated whether men and women receive comprehensive coverage as articulated by Congress,[163] but failed to analyze the nature of these polices on the subjugation of women in the labor force, as this Article advocates. In analyzing such exclusions, the proper test is to move beyond binary categorizations as implicated by the equality model. The question should be whether the policy acts to disrupt women's careers and cause their increased subordination in the labor market.

The most recent decision regarding infertility exclusions, *Hall v. Nalco Co.*,[164] reached the wrong conclusion as a result of this failure to analyze infertility exclusions under the dominance approach. The court reviewed a district court's grant of summary judgment to an employer who fired an employee for taking time off to undergo IVF.[165] The Seventh Circuit held that "Hall was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity."[166] Based on Justice Stevens' dissent in *Gilbert*, as articulated in *Johnson Controls*, the court wrongly determined that the policy was disparate treatment such that Hall had stated "a cognizable claim of sex discrimination under Title VII."[167] This analysis, however, was incorrect.

The PDA clearly articulates that pregnancy exclusions are not gender-neutral, and as such, disparate treatment

159. *Id.* at 346.

160. *Id.*

161. *Id.* at 346 n.4.

162. *See id.* at 345–46; Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 680–81 (8th Cir. 1996).

163. *See Saks*, 316 F.3d at 346–49; *Krauel*, 95 F.3d at 679–80.

164. 534 F.3d 644 (7th Cir. 2008).

165. *Id.* at 645.

166. *Id.* at 649.

167. *Id.*

jurisprudence, not disparate impact, is implicated.[168] Therefore, if infertility is a related medical condition under the PDA, it is disparate treatment and must withstand the BFOQ standard to survive.[169] It is unlikely that an employer could successfully argue that fertility is a BFOQ except for a position as a sperm donor or a surrogate. Under disparate impact theory, however, the appropriate inquiry turns on whether such an impact reinforces the subjugation of women in the labor market—the dominance approach.[170]

A. Infertility Exclusions do not Constitute Disparate Treatment

Courts consider a policy that is facially discriminatory disparate treatment.[171] However, infertility is not sex-specific.[172] Both men and women can be infertile, and the treatments are the same—ART.[173] The *Hall* court found disparate treatment because "[e]mployees terminated for taking time off to undergo IVF—just like those terminated for taking time off to . . . receive other pregnancy—related care-will always be women."[174] However, time off for medical procedures is not sex specific. A company with a policy that individuals can take time off for every procedure but IVF may fall afoul of a gendered line, but even in the case of Ms. Hall, she was allowed time off for IVF once.[175] Congress has enacted limits in all manner of time-off provisions,[176] such that a court can fairly interpret limits to the amount of time an employer must give an employee for medical treatment. Furthermore, an infertility exclusion is not based on the "capacity to become pregnant"[177] since an infertile woman, by definition, does not

168. *See supra* notes 81–88 and accompanying text.

169. *See supra* notes 82–84 and accompanying text.

170. KENNEY, *supra* note 67, at 149–50, 155 (describing disparate impact and the dominance approach).

171. KENNEY, *supra* note 67, at 149–50.

172. MUNDY, *supra* note 10, at 10.

173. BALEN & JACOBS, *supra* note 11, at 306, 313 (discussing IVF as a treatment for both male and female infertility problems).

174. Hall v. Nalco Co., 534 F.3d 644, 648–49 (7th Cir. 2008).

175. *Id.* at 645–46.

176. For example, the Family Medical Leave Act only requires that employers give twelve weeks of leave in a calendar year to an employee to deal with major medical issues. 29 U.S.C. § 2612 (2006). Additionally, in discussing the amount of time involved in accommodating pregnant women, Congress understood it to be a finite amount of time. S. REP. NO. 95-331, at 4 (1977) ("Since the period of disability for a normal pregnancy is 4–8 weeks, benefits will normally be paid only for that period.").

177. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting),

possess the capacity to become pregnant. Therefore, it is not clear that exclusions on the basis of infertility are, on their face, impermissible sex classifications.

B. Infertility Exclusions May Cause a Disparate Impact on Women

A practice that has a disparate impact on women can also be an impermissible sex classification.[178] Such a disparate impact is present if the practice operates to deny women equal employment opportunities and foster stratified job environments that disadvantage women.[179] In such a determination, the social context of working women and employment practices that have "exacerbate[d] women's comparatively transient role in the labor force . . ."[180] are relevant. The first determination, then, is whether infertility exclusions primarily impact women.[181]

1. Infertility Exclusions Can Primarily Impact Women

The research on infertility suggests that infertility equally afflicts men and women.[182] These findings imply that if employers exclude all fertility coverage from benefit plans, men and women would be equally impacted. The argument that women are more negatively impacted by an inability to have children and hence suffer disproportionately[183] is difficult to reconcile with the history of employment discrimination based on maintaining women's stereotypical role in the family.[184] As the Supreme Court has noted, a practice "based on . . . stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal employment

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superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, *as recognized in* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

178. KENNEY, *supra* note 67, at 148–50 (discussing the Supreme Court's expanded definition of discrimination in Title VII as prohibiting disparate impact).

179. *See Gilbert*, 429 U.S. at 160 (Brennan, J., dissenting).

180. *Id.* at 158.

181. *Id.* at 155.

182. MUNDY, *supra* note 10, at 10.

183. Brietta R. Clark, Erickson v. Bartell Drug Co.*: A Roadmap for Gender Equality in Reproductive Health Care or An Empty Promise?*, 23 LAW & INEQ. 299, 323 (2005) ("Both men and women who have suffered through this process [of infertility] have testified to the unique and particularly isolating pain that women suffer, due in part to the reality that for many women, their self-image and society's image of them is strongly tied to the ability to have a child.").

184. *See Gilbert*, 429 U.S. at 159–60 (Brennan, J., dissenting) (noting that employment policies are not created in a social vacuum and must be evaluated in light of prevailing "stereotypes and signals").

opportunity."[185] It would be illogical to find employment discrimination in policies that consider women primary caregivers—and hence, transient workers—while at the same time determining that an inability to bear children creates a disproportionate burden on women, since they rely on this stereotype for their positive self-image. This faulty reasoning asserts that the same social context that disadvantages women for their childbearing capacity would provide justification for finding disadvantage if they did *not* in fact have that childbearing capacity.[186]

Since many insurance plans cover lower level infertility interventions under other provisions,[187] the more relevant question is whether exclusions for ART have a greater impact on women than men. Certainly IVF is a costly venture.[188] However, IVF is a treatment not just for unexplained female infertility, but also for male infertility,[189] suggesting that the costs would be equally born by men and women if not covered by insurance. Determining the appropriate correlative treatment for men whose infertility is not resolved from IVF, however, indicates that costs may be more difficult to compare. While IVF can resolve a woman's underlying infertility, sperm donations—ranging from $300 to $850[190]—do not address men's underlying fertility issues after circumventing them.[191]

Even if adequate medical interventions for male infertility existed, the ability to contribute sperm to a pregnancy is only a part of the equation. A woman with a viable egg and uterus only needs sperm to help her have a child. A man with viable sperm, on the other hand, needs the donation of an egg and a viable uterus.[192] In equating men's and women's infertility, the actual

185. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987).

186. *See supra* notes 186–189 and accompanying text.

187. *See, e.g.*, Saks v. Franklin Covey Co., 316 F.3d 337, 341 (2d Cir. 2003) (noting that Franklin Covey's health insurance plan allowed employees to "claim benefits for a variety of infertility products and procedures, such as ovulation kits, oral fertility drugs, penile prosthetic implants . . . and nearly all surgical infertility treatments."). In the case of unexplained infertility, however, the treatment aims to achieve pregnancy without removing the underlying cause of the infertility. BALEN & JACOBS, *supra* note 11, at 302.

188. Monahan, *supra* note 35, at 160 (noting that the average cost of just one cycle of IVF is between $10,000 and $15,000).

189. BALEN & JACOBS, *supra* note 11, at 313.

190. Collura, *supra* note 34.

191. BALEN & JACOBS, *supra* note 11, at 273.

192. *See* SHERRY F. COLB, WHEN SEX COUNTS: MAKING BABIES AND MAKING LAW, 62–66 (2007). Colb notes that the discussion of parentage as only being about the equal contribution of DNA by men and women "dismiss[es] as irrelevant the

cost of addressing men's infertility needs to be determined.[193] In the end, therefore, it is not clear that infertility exclusions from insurance coverage have a disproportionate impact on women in terms of cost.

Cost is not the only factor to evaluate when determining if infertility exclusions disproportionately burden women workers. Arguably, women undergoing ART may need more time away from work to achieve pregnancy than men. This is the precise nature of the claim in *Hall*. As the court noted, "[e]ach IVF treatment takes weeks to complete, and multiple treatments are sometimes needed to achieve a successful pregnancy."[194] In this regard, the time off work necessary for women to receive fertility treatments relative to men may have a greater impact on women than on men.[195]

2. Infertility Exclusions Do Not Negatively Impact Women's Role in the Labor Force

A plaintiff's ability to show that infertility exclusions have a differential impact on women as compared to men, however, is not the end of a disparate impact analysis. A disparate impact showing is only a violation of Title VII if there is a correlative "exacerbat[ion of] women's comparatively transient role in the labor force."[196] If such an impact "downgrade[s] women's role in the labor force" then the policy is impermissible.[197]

Denying a woman time off for ART does not negatively impact her role in the workforce. Unlike pregnancy, where a pregnant woman has no options—other than an abortion—to choose work over family, in the case of ART a woman is making the choice to undergo timely and expensive treatments to attempt to conceive. While it may be a legitimate personal choice, to expect an employer to pay for this choice goes beyond the PDA's goal of minimizing the disruptions to women's role in the labor force.[198] Finally, insurance coverage of ART encourages pronatalist

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unique (and clearly essential) contribution that women make" of carrying a child to term. *Id.*

193. This is as opposed to simply relying on donor sperm.

194. Hall v. Nalco Co., 534 F.3d 644, 645–46 (7th Cir. 2008).

195. However, given the availability of twelve weeks of leave through the Family Medical Leave Act, it is not clear that this impact is very large or widespread. 29 U.S.C. § 2612 (2006).

196. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 158 (1976) (Brennan, J., dissenting) *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, *as recognized in* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

197. *Id.* at 149.

198. *See supra* Part IV.

attitudes[199] that not only hearken back to the ideology of separate spheres,[200] but also may distort labor market opportunities for women, as employers (illegally) try to avoid these costs by not hiring women.[201] Coverage of ART increases the utilization of such techniques,[202] thereby increasing the disruption to women's careers. Further, it decreases the incentive for employees to demand truly family-friendly work policies since women are lured into thinking they can almost indefinitely delay childbearing.

Justice Brennan captured this tension between work and family in his *Gilbert* dissent when he dismissed the characterization of pregnancy as a purely voluntary event.[203] Justice Brennan rejected arguments that the voluntariness of pregnancy permitted its exclusion from General Electric's disability plan, since all pregnancies were not voluntary and the plan covered other voluntary disabilities.[204] Congress similarly treated the "proposition that pregnancy is a voluntary condition [a]s overbroad"[205] by considering facts about unplanned pregnancy in their deliberations.[206] The choice to undergo ART, however, is voluntary, making repetitive bouts of missed work more burdensome to employers and not necessarily something Congress would find compelling to require.[207] Therefore, while the effects of time-off provisions for infertility may be different for women and men, it is not a difference that Congress sought to repair as a "desired end product[] of the relevant legislati[on]."[208]

Furthermore, Justice Brennan distinguished between policies based on "neutral, persuasive actuarial considerations" and those that "stemmed from a policy that purposefully downgraded women's role in the labor force."[209] The implication is that employers can take actuarial considerations into account when

199. HARWOOD, *supra* note 2, at 102.

200. *See supra* notes 48–55 and accompanying text.

201. KENNEY, *supra* note 67, at 155.

202. *See supra* notes 45–46.

203. *Gilbert*, 429 U.S. at 151 n.3 (Brennan, J., dissenting).

204. *Id.* at 151.

205. *Id.*

206. FACT SHEET ON S. 995, *reprinted in* PDA LEG. HISTORY, *supra* note 105, at 21 (noting that a large percentage of pregnancies are not voluntary or planned).

207. For example, under the Americans with Disabilities Act, the expectation of reasonable accommodations for people with disabilities is tempered by the ability of employers to demonstrate an undue burden. 42 U.S.C. § 12111 (2006). Two of the factors of an undue burden are cost and financial resources of the employer. *Id.*

208. *Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting).

209. *Id.* at 149.

designing workplace policies,[210] so long as they are not byproducts of policies intended to negatively affect women's role in the labor force.

Finally, the *Hall* court's determination removes the employment decision from its context in a way that alters the logic. Followed to its conclusion, it subverts the stated intent of the PDA. An employer like Johnson Controls could not bar women from taking jobs that make them infertile[211] and would also be barred from denying them time off or insurance coverage to treat their infertility. In essence, then, an employer could become strictly liable for a woman's infertility. The only way to avoid this strict liability would be for employers to offer no insurance benefits or time off for disabilities to any employees,[212] or to illegally discriminate against women by not hiring them.[213] Given the positive impact of leave policies on the ability of women to participate in the labor force, this is an absurd result and certainly not one desired by Congress. The option to avoid hiring women needs no further comment.

Conclusion

Congress' intent in passing the PDA was to protect women from "the sex stereotyping [about pregnancy that results] in unfavorable disparate treatment of women in the workplace."[214] Equality of women in the labor force, with respect for the "commonsense" understanding that women have the responsibility and burden of bearing children, was the goal.[215] Encouraging pronatalist policies was not.

Interpreting the PDA to mandate infertility coverage would not further these policy goals for other reasons. While it is not certain that insurance coverage for ART encourages women to delay childbearing to pursue careers,[216] the potential for such a moral hazard exists.[217] Furthermore, some feminists see

210. *See supra* notes 43–45 and accompanying text.

211. UAW. v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991).

212. S. REP. NO. 95-331, at 5 (1977) ("[S]ince the basic standard is comparability among employees, an employer who does not provide medical benefits at all would not have to pay the medical costs of pregnancy or childbirth.").

213. KENNEY, *supra* note 67, at 155.

214. S. REP. NO. 95-331, at 3.

215. *Id.*

216. HARWOOD, *supra* note 2, at 4, 100.

217. EPSTEIN, *supra* note 45, at 335. Epstein argues that disability coverage for pregnancy will encourage women to become pregnant; however, the idea that such a moral hazard would operate in terms of covering pregnancy was specifically

infertility technologies as "reinforcing women's oppression, giving scientific and therapeutic support to the patriarchal presumption that reproduction is a woman's prime commodity."[218] The existence of reproductive technology creates the illusion that women can delay childbirth almost indefinitely.[219] This illusion, in turn, diminishes the pressure on businesses to more "adequately accommodate the reality of childbearing and child rearing as a fact of human existence—for example, through high-quality and accessible child care, paid parenting leave for mothers and fathers, and/or part-time work for one or both parents with benefits and without penalty."[220] For these reasons, it is clear that increasing the demand and market for ART actually increases women's subordination in the workplace.

In the end, Title VII and the PDA, as statutes concerned with preventing workplace discrimination on the basis of sex, are limited vehicles for women attempting to expand employer coverage for infertility. In the constitutional context, parenthood is generally not considered a fundamental right.[221] In the case of infertility, when a woman has yet to carry and birth a child, it is difficult to argue that a woman has a fundamental right to be a parent without invoking the same stereotypes about women as mothers that are at the root of employment discrimination in the first place.[222] The Supreme Court more recently approved federal prophylactic legislation to deter discrimination on the basis of these stereotypes,[223] indicating that they may be unlikely to

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repudiated by the case law and Congress. *Id.* In the context of insurance coverage for ART, it is more plausible that infertile women, desperate for some hope of pregnancy, will utilize the benefit beyond the point of social benefit. This desperation is already evident even without mandated insurance. "[For many women] the quest to conceive becomes an endless, bottomless demand, driving them in many cases to pay whatever they can: to take out a second mortgage, wipe out their savings, or give up a lucrative job." SPAR, *supra* note 12, at 32.

218. HARWOOD, *supra* note 2, at 21 (citing Anne Donchin, *Feminist Critiques of New Fertility Technologies: Implications for Social Policy*, 21 J. OF MED. & PHIL. 475, 475–76 (1996)).

219. The illusion is based on the perception that ART is universally effective. Studies show that age impacts fertility treatments in the same way that it impacts fertility. Forty-year-old women using IVF have a twenty-five percent chance of becoming pregnant. The chance diminishes to ten percent at age forty-three and zero percent at age forty-six. *See* SPAR, *supra* note 12, at 42.

220. HARWOOD, *supra* note 2, at 4.

221. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (holding that a natural father does not possess a fundamental right to be a parent that supersedes the state's interest in supporting a marriage).

222. *See supra* notes 186–190 and accompanying text.

223. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 722 (2003) (finding the Family Medical Leave Act constitutional since it worked to remedy discrimination based on stereotypes "unsuccessfully" addressed by the PDA).

approve policies that perpetuate those same stereotypes. In the end, the Americans with Disabilities Act may be a better vehicle for women to use to earn benefits for infertility, since the most recent amendments to the Americans with Disabilities Act included "reproductive functions" as a major life activity for determining whether a disability exists.[224] Such an approach would allow employers to openly address cost concerns as an undue burden without illegally avoiding hiring women. Under Title VII, however, employer classifications based on infertility do not rise to the level of illegal discrimination, and to hold otherwise does a great disservice to the advances of women in the workforce in the last thirty years.

224. 42 U.S.C. § 12102(2)(b) (2006) ("For purposes of [defining disability], a major life activity also includes the operation of a major bodily function, including . . . reproductive functions.").